No. 93-180

In The

Supreme Court of the United States

October Term 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit's decision presents a true jurisdictional conflict involving a maritime joint tortfeasor's right to seek contribution from another joint tortfeasor who has settled with the injured party.

LIST OF PARTIES

Respondent Florida Power & Light Company's parent company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Boca Grande Club, Inc. ("Boca Grande") correctly states there are three general approaches to contribution by non-settling maritime joint tortfeasors. Pet. at 5. Boca Grande neglects to identify, however, the precise approach it urged and the district court adopted in the order granting summary judgment in Boca Grande's favor and against Florida Power & Light Company's ("FP&L's") contribution claim. This Statement of the Case corrects this omission and reveals Boca Grande has never before taken the position it now advances in its petition for certiorari. It also discloses that the approach Boca Grande actually took below is at odds with the holdings in the very decisions it now aligns itself with in its effort to depict a conflict worthy of review on certiorari.

A. Boca Grande's Motion for Summary Judgment

Although its petition embraces a range of decisions applying versions of two of the three possible approaches to contribution by a non-settling maritime joint tortfeasor, Pet. at 5-10, Boca Grande took a very different and narrower stance below. In its motion for summary judgment, Boca Grande urged only a variation of the second approach, the so-called "settlement bar rule." RA 4-5.[1] In this regard, Boca Grande argued that because it had settled with the decedents, any possibility that it might have to pay a claim for contribution to FP&L or any other

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[1] References to Respondent's Appendix ("RA") and to Petitioner's Appendix ("A") will be as above, by letters and numbers.

joint tortfeasor who had paid more than its equitable share was automatically extinguished. RA 4-5.

In addition, Boca Grande specifically opposed the imposition of a condition that its settlement be in good faith to prevent unfairness to other tortfeasors and collusion among the settling parties. RA 5-13. In opposing this condition, Boca Grande rejected as "wasteful and unworkable" the Ninth Circuit's imposition of this condition in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989). RA 10-11. Boca Grande's petition now purports to adopt *Miller*'s reasoning. Pet. at 5, 7.

B. The District Court's Order

The district court entered an order granting summary judgment which adopted the precise version of the second approach Boca Grande urged. A 5-7. It held Boca Grande's settlement with the decedents constituted an absolute bar to FP&L's action for contribution, and it specifically rejected any requirement that the settlement be non-collusive or in good faith. A 6-7.

C. The Eleventh Circuit's Decision

The settlement bar rule on which Boca Grande and the trial court relied was rejected by the Eleventh Circuit in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992). *Great Lakes* was decided during the pendency of the appeal in the instant case. It adopted the first approach under which an action

for contribution against a settling joint tortfeasor is permitted. *Id.* at 1582-83. Based on the intervening decision in *Great Lakes*, the Eleventh Circuit vacated the instant summary judgment and remanded the case for resolution of FP&L's contribution claim against Boca Grande. *In Re: Complaint of Boca Grande Club, Inc.*, 990 F.2d 606, 607 (11th Cir. 1993).

REASONS FOR DENYING THE WRIT

In its "Reasons for Granting the Writ," Boca Grande contends other federal circuits and one state court have adopted rules concerning contribution against a settling maritime joint tortfeasor that conflict with the instant Eleventh Circuit decision in *In Re: Complaint of Boca Grande Club, Inc.*, 990 F.2d 606 (11th Cir. 1993). Pet. at 5-10. Contrary to Boca Grande's assertion, however, review of the governing principles and the decisions on which Boca Grande relies reveals there is no true decisional conflict or other reason for granting certiorari. In any event, the Supreme Court need not reach the question Boca Grande poses because Boca Grande has never previously urged the position it now claims to support and adopt.

The Eleventh Circuit's Decision Does Not Present A True Jurisdictional Conflict Involving A Maritime Joint Tortfeasor's Right To Seek Contribution From Another Joint Tortfeasor Who Has Settled With The Injured Party.

A. Certiorari was recently denied under identical circumstances in *Great Lakes*

Putting to one side that it does not articulate the "special and important reasons" required under Rule 10

for this Court to grant certiorari, Boca Grande's request for review faces a threshold obstacle. Boca Grande's petition rests on its contention that the rule the Eleventh Circuit applied to reverse the summary judgment in the instant case conflicts with decisions of other circuits and one state court. Pet. at 5-10. The rule Boca Grande challenges was announced in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992) ("*Great Lakes*"). *Great Lakes* is the focal point of Boca Grande's petition.

Boca Grande's attack on the rule in *Great Lakes* is seriously undermined because the Supreme Court recently denied certiorari in that case. *Id.* As shown below, there has been no new decision or other change in circumstances since the denial of certiorari in *Great Lakes* to generate a jurisdictional conflict or other reason for review where one did not exist previously. Because the Supreme Court recently denied certiorari under identical circumstances, the instant petition should be denied as well.

B. There is no true conflict among the circuits or with the Alabama Supreme Court

There exists no true conflict between the instant Eleventh Circuit decision and the other circuits or the Alabama Supreme Court concerning contribution against a settling maritime tortfeasor. While there are three generally recognized approaches to the issue, the approaches the courts have actually adopted are not in conflict. The

first approach, which was adopted by the Eleventh Circuit in *Great Lakes* and applied here, does not conflict with the third approach. The second approach, which Boca Grande urged below, has not been adopted exclusively by the other federal appellate courts or the Alabama Supreme Court. For these reasons, this case does not present a true conflict concerning contribution against a settling maritime tortfeasor.

1. The first and third approaches are not in conflict.

As noted in Boca Grande's petition, the authorities recognize three generally accepted methods for dealing with contributions against settling tortfeasors. They are:

> (1) Allowing an action for contribution against the settling tortfeasor by any other tortfeasor who has paid more than his or her equitable share of the plaintiff's claim;
>
> (2) Imposing a bar to contribution claims against the settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith;" and
>
> (3) Reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.[2]

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[2] The first approach, which the Eleventh Circuit adopted in the instant case, has been called the fairest solution by the *Restatement*. *Miller*, 887 F.2d at 905. The second, the settlement bar rule Boca Grande advocated below, is described by the

Great Lakes, 957 F.2d at 1581, citing *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989), and *Restatement (Second) of Torts*, § 886A comment m (1979).

Both the first and third approaches are consistent with the Supreme Court's key decisions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).[3] *Cooper* reaffirmed the general tenent of maritime law that one joint tortfeasor is entitled to contribution from another joint tortfeasor. In articulating this conclusion, the Supreme Court identified the core principles underlying maritime contribution as (1) a more equal distribution of justice and (2) safety or deterrence. 417 U.S. at 110-111.

In discarding the old rule of equally divided damages in favor of apportionment of damages according to degrees of causative fault, *Reliable Transfer* focused on the

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Restatement as potentially unfair to non-settling tortfeasors in the absence of a good faith requirement to prevent collusion. *Id.*

Presumably because it argued in favor of the second option *without* the condition that the settlement be in good faith and non-collusive, RA 5-13, Boca Grande omits any reference to a good faith requirement in its articulation of the three methods. Pet. at 5.

[3] Boca Grande does not and cannot claim the Eleventh Circuit's decision in the instant case conflicts with *Cooper*, *Reliable Transfer*, or *Edmonds*. Instead, it makes the non-jurisdictional argument that these cases do not "require" or "support" the Eleventh Circuit's result or "inhibit" a different approach. Pet. at 6.

principle of a more equal distribution of justice. 421 U.S. at 401-11, 44 L.Ed.2d at 256-262. In rejecting the same argument Boca Grande makes here – that apportionment of fault will frustrate settlements – the Supreme Court observed:

> [T]he [defendant's] argument is hardly persuasive. For if the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] absolve it of all liability. . . . But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements and relieves the courts of some litigation.

421 U.S. at 408; 44 L.Ed.2d at 260-261.

As the Eleventh Circuit observed in *Great Lakes*, allowing an action for contribution is also consistent with the Supreme Court's decision in *Edmonds*. "The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution." 957 F.2d at 1582.

Against this background, the reasoning underlying approaches one and three is the same and the approaches are not in conflict. Both methods further the principle of a more equal distribution of justice by apportioning the liability of multiple wrongdoers according to comparative degrees of fault as required under *Reliable Transfer*, 421 U.S. at 411, 44 L.Ed.2d at 262. Both methods are designed

to prevent a non-settling joint tortfeasor from paying more than his or her adjudicated proportionate share of a judgment or settlement.

Likewise, the first and third approaches both promote safety. No doctrine is more firmly entrenched in the maritime law than the principle that comparative fault apportionment promotes safety by focusing deterrence on the party most responsible for the harm. *See, e.g., Reliable Transfer*, 421 U.S. at 405, n. 11, 44 L.Ed.2d at 259; *Cooper*, 417 U.S. at 110-11, 40 L.Ed.2d at 699-700.

Apparently Boca Grande's contention is that the first and third approaches are inconsistent because they employ different procedures. Pet. at 5-10. The first method allows an action for contribution by a non-settling joint tortfeasor against a settling tortfeasor, while the third precludes such an action in favor of a pro rata adjustment between tortfeasors. Pet. at 6-10.

Boca Grande's conflict argument rests on a superficial and technical distinction, not a real difference. The third and first approaches are not inconsistent. Instead, they merely employ slightly different methods to achieve the same objectives.

Under the first approach, an action for contribution assures that liability among joint tortfeasors is distributed according to comparative degrees of fault. This achieves the goals of a just and equitable allocation of damages and an efficient level of deterrence against future negligence. *Great Lakes*, 957 F.2d at 1581-82. Under the third approach, a non-settling tortfeasor receives a credit for the percentage of the judgment corresponding to the settling defendant's degree of fault. This credit makes a

contribution action unnecessary, because the credit protects the non-settling defendant from paying more than his or her proportionate share of the judgment. It also encourages deterrence by requiring negligent parties to pay their fair share.

Thus, under both approaches, the goals of achieving a more equitable distribution of justice and an efficient level of deterrence are realized. While the first and third approaches may differ somewhat in the means they employ to these ends, the identity of purposes and results under both approaches demonstrates the real and intolerable conflict required for certiorari review is not presented here.

2. Neither the circuits nor the Alabama Supreme Court have adopted the second approach exclusively.

That the first and third approaches are consistent with each other is fatal to Boca Grande's petition. Neither the circuits nor the Alabama Supreme Court have adopted the second method exclusively. For this reason, even if Boca Grande is correct in its assertion that the first approach is inconsistent with the second, the failure of any jurisdiction to adopt the second approach exclusively eliminates the possibility of a true conflict.

The cases demonstrate that the courts have adopted the first or third approach exclusively or combinations of the three approaches. *Great Lakes*, 957 F.2d at 1581-83 (adopting first approach); *Associated Electric Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991) (adopting third approach); *Miller*, 887 F.2d at 903-08

(not deciding between second and third approaches). In *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5th Cir. 1992), a decision more recent than the Fifth Circuit cases cited by Boca Grande,[4] the Court acknowledged its position is "uncertain," with cases following both the second and third approaches. Even Boca Grande's cases acknowledge this intramural division in the Fifth Circuit. *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, ___ So.2d ___, (Ala. 1993), A 33-34; *In Re: The Glacier Bay*, 1993 AMC 1530, 1534, n.10 (D. Alaska 1993).

The two district court decisions cited by Boca Grande, *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991), and *In Re: The Glacier Bay*, also fail to set up the requisite jurisdictional conflict. Neither decision adopts the second approach exclusively. *Stanley*, 781 F. Supp. at 221-26 (adopting combination of second and third approaches, depending upon which method more favorable to *non*-settling defendant); *Glacier Bay*, 1993 AMC at 1536-38 (rejecting second approach and adopting third). In any event, because *Stanley* and *Glacier Bay* are trial rather than appellate level decisions, neither can serve as a basis for establishing conflict jurisdiction under Rule 10.

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[4] The older Fifth Circuit decisions cited by Boca Grande are *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242, 117 L.Ed.2d 474 (1992), *Hernandez v. N/V Rajaan*, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988), and *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Boca Grande's reliance on *Amerada Hess* is also misplaced. If and when *Amerada Hess* becomes a final decision of the Alabama Supreme Court within the meaning of Rule 10, it still cannot present a jurisdictional conflict. *Amerada Hess* adopts the third approach, which is consistent with the first approach adopted by the Eleventh Circuit in the instant case. *Amerada Hess* specifically rejects the second approach which Boca Grande urged below. A 42-44.[5]

In short, not *one* of the courts on which it now relies has adopted exclusively the extreme position Boca Grande took below. Indeed, only three courts – the Fifth Circuit, the Ninth Circuit, and the Southern District of New York – purport to follow *any* version of the second approach. Because the first approach the Eleventh Circuit follows is consistent with the third approach, and because neither the circuits nor the Alabama Supreme Court have adopted the second approach exclusively, the conflict Boca Grande describes does not exist. In the absence of a square and irreconcilable conflict, certiorari should be denied.

It is not surprising that the second approach, the only method Boca Grande urged below, has not won widespread support. The second approach violates *Reliable*

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[5] *Amerada Hess* is the only assertedly conflicting case relied on by Boca Grande that had not already been decided when the Supreme Court denied certiorari in *Great Lakes*. Although *Amerada Hess* was available to Boca Grande to present in a petition for rehearing or suggestion of rehearing *en banc* in the Eleventh Circuit, Pet. at 7, Boca Grande declined to do so, presumably because it had never urged the third approach *Amerada Hess* adopts.

Transfer's principle of "a fair and equitable" allocation of damages, 421 U.S. at 411, 44 L.Ed.2d at 262, because it makes it possible for a non-settling tortfeasor to bear a disproportionately greater amount of damages, far in excess of culpability, merely because the plaintiff decides to settle with another tortfeasor. *Great Lakes*, 957 F.2d at 1582. The second approach also creates an incentive for collusion between the plaintiff and one or more tortfeasors to take advantage of a joint tortfeasor with a deeper pocket. *See Miller*, 887 F.2d at 905.

This very harm was one of the reasons the Supreme Court rejected the common law rule of no contribution in *Cooper*. As the Seventh Circuit has recognized,

> [the second approach] would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first. The consequences of the race to settle to the loser of the race are among the reasons for finding the old common law rule of no contribution objectionable.

Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1985).

The second approach also does violence to the goal of encouraging safety and deterring negligence. If maritime defendants can avoid the true measure of their liability by making quick settlements, the deterrent effect of comparative fault will be negated. On the other hand, if maritime tortfeasors are required to bear responsibility for the portion of the damages caused by their own negligence, an efficient level of deterrence against future negligence is assured. *Great Lakes*, 957 F.2d at 1582.

Contrary to Boca Grande's suggestion that the second approach will encourage settlement and bring a quick end to litigation, logic indicates the second approach will promote quick but only partial and often unjust settlements, ultimately delaying resolution of the entire case. Under the second option, once a plaintiff settles with one defendant, there is no incentive to settle with the non-settling defendant, because the plaintiff need establish only one percent of fault on the non-settling tortfeasor's part to recover the entire judgment. This reality will delay the final disposition of lawsuits, contrary to the goal of full and complete settlements Boca Grande espouses. *Cf. Reliable Transfer*, 421 U.S. at 408, 44 L.Ed.2d at 260 ("[I]f the fault of two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability").

Finally, even if the first approach has a slight deterrent effect on full and complete settlements,[6] the Supreme Court has expressed a preference for the principle of a more equal distribution of justice. "[The argument against comparative fault] asks us to continue the operation of an archaic view because its facile application out of court yields quick, though inequitable, settlements,

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[6] As the Eleventh Circuit observed, "the deterrent effect on settlements [under the first approach] . . . is far from clearly established," particularly when compared to application of the second approach with a good faith requirement. *Great Lakes*, 957 F.2d at 1582. This version of the settlement bar rule is described in *Miller* and, in contrast to the position Boca Grande took below, it is one of the approaches Boca Grande now adopts. Pet. at 5-10.

and relieves the courts of some litigation." *Great Lakes*, 950 F.2d at 1582, quoting *Reliable Transfer*, 421 U.S. at 408, 44 L.Ed.2d at 261.

C. Boca Grande's argument in favor of both the second and third approaches is not properly before the Supreme Court for review

The previous discussion assumes Boca Grande's broad argument in favor of *either* the second *or* the third approach is now properly before the Supreme Court. Review of the record shows, however, that Boca Grande took a different, inconsistent position below, and that it has never before made the amorphous argument it now advances. Boca Grande should not be permitted at this late stage to discard its previous argument in favor of a new, contradictory stance simply because it is expedient for it to do so in its attempt to depict a conflict for review on certiorari.

As noted, Boca Grande previously argued in favor of a harsh form of the second approach under which a settlement acts as an absolute bar to any contribution in favor of a joint tortfeasor who has been saddled with more than his or her fair share of damages. RA 4-5. Boca Grande specifically opposed a more moderate variation of the second approach recognized in the Restatement and *Miller* under which the settlement must be shown to be in good faith and not a product of collusion between the settling parties. RA 6-13. As for the third approach, Boca Grande did not even mention it below, much less support it. RA 4-13. Having never before made a broad, unqualified argument in favor of *both* forms of the second

approach *and* the third approach, Boca Grande should not be heard to take such a position now.

CONCLUSION

Only last term, the Supreme Court denied certiorari in *Great Lakes* under circumstances identical to the situation presented here. Nothing has changed since that time to dictate a different result. Contrary to Boca Grande's claim, review of the relevant cases shows there is no true jurisdictional conflict or other basis under Rule 10 for reviewing the issue of contribution against a settling maritime tortfeasor. Boca Grande's petition for a writ of certiorari should be denied.

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CONTENTS OF APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E

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CASE NO. 88-1636-Civ-T-17A

IN ADMIRALTY

MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS OF FLORIDA POWER & LIGHT COMPANY AND THE O'DAY CORPORATION

Boca Grande Club, Inc., Plaintiff, moves the court for entry of an order granting summary judgment as to the claims of Florida Power & Light Company (FPL) and The O'Day Corporation (O'Day) for indemnity or contribution. Boca Grande Club would show to the Court that there do not exist in this case any disputed facts with respect to the claims of FPL and O'Day for indemnity or contribution and, accordingly, summary judgment is appropriate as a matter of law. Rule 56, *F. R. Civ. P.*

Memorandum in Support of Motion

This limitation action was started by Boca Grande Club as a result of the deaths of Dr. Polackwich and Jonathan Richards when the mast of the sailboat they were operating in the navigable waters of Gasparilla Pass

contacted a high voltage electric transmission line. The claims of the estates of Dr. Polackwich and Jonathan Richards as well as the claims of others (heretofore and herein called collectively "Stipulating Claimants") filing claims in the limitation action as a result of the deaths have been settled by Boca Grande Club. This Court, in its order of March 13, 1991, dismissed with prejudice all the claims, with two exceptions, arising out of the deaths. The two remaining claims are those of FPL and O'Day for "indemnity and contribution." (See doc. 10 and 11). In its order of March 13th the Court stayed further proceedings in this limitation action until resolution of state court actions brought by the Stipulating Claimants in Palm Beach County. The Court permitted Boca Grande Club to file a motion for summary judgment as to the claims of FPL and O'Day for indemnity and contribution.

Boca Grande Club will demonstrate in this memorandum that neither FPL nor O'Day ever had actions for indemnity. Boca Grande Club will also demonstrate that the settlement it made with the Stipulating Claimants effectively bars any action that FPL and O'Day may have had for contribution. Because FPL and O'Day have no claims upon which this Court may grant relief, summary judgment is particularly appropriate. Rule 12, *F. R. Civ. P.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct Court 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

A. The Indemnity Claims.

Both FPL and O'Day have asserted claims for indemnity. It is fundamental that indemnity arises only out of a contract which provides for one to indemnify another or out of a relationship whereby one party, who is without fault, may nevertheless become vicariously liable for the negligence of another. An example is the relationship of master and servant. See generally, Prosser & Keeton, The Law of Torts, (5th ed 1984), §51. There is no contract between Boca Grande Club and FPL or O'Day. Accordingly, contract can furnish no basis for the indemnity claims of FPL and O'Day.

Similarly, there is no relationship between Boca Grande Club on the one hand and either FPL or O'Day on the other out of which FPL or O'Day would be held vicariously liable for any wrongdoing of Boca Grande Club. No such relationship was alleged and none exists. If FPL or O'Day are ultimately found to be liable to the Stipulating Claimants it will be because of the act or omission of FPI [sic] or O'Day Corporation and not because of an act or omission of Boca Grande Club.

At one time a third theory of indemnity, known as the concept of active-passive negligence, prevailed in maritime cases. That theory permitted a wrongdoer who was merely passively negligent to obtain indemnity from an actively negligent party. The active-passive negligence theory of indemnity no longer prevails. It was rejected by the United States Court of Appeals for the Fifth Circuit in *Loose v. Offshore Navigation, Inc.*, 670 F. 2d 493, 500-502 (5th Cir 1982). Rejection of the doctrine was approved by

the United States Court of Appeals for the Eleventh Circuit in *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540, 1556-1557 (11th Cir 1987). Even were the active-passive theory still viable it would not support indemnity in this case because the liability of FPL and O'Day will depend on the acts of each and not on the acts of some other party.

Neither FPL nor O'Day have alleged any facts which would support indemnity and there is in fact no basis for indemnity in this case. Accordingly, the Court should forthwith grant summary judgment in favor of Boca Grande Club as to the indemnity claims of FPL and O'Day.

B. The Contribution Claims.

FPL and O'Day also assert claims for contribution against Boca Grande Club. Each has alleged that if it is found liable to the Stipulating Claimants then it is entitled to contribution from Boca Grande Club. It is the position of Boca Grande Club that pursuant to the law of the Eleventh Circuit the settlement it made with the Stipulating Claimants effectively bars claims for contribution by non-settling tortfeasors such as FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540 (11th Cir 1987); *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller,* 1990 A.M.C. 2247 (M.D. Fla. 1990).

The contribution claims of FPL and O'Day are maritime claims which are governed by maritime law. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed 2d 694 (1974); *Self v. Great Lakes Dredge &*

Dock Company, 832 F. 2d 1540, 1547 (11th Cir 1987); *Daughtry v. Diamond M Company,* 693 F. Supp 856 (C.D. Cal. 1988).

In *Self,* the Eleventh Circuit held:

> Under the principle announced in *Luke v. Signal Oil & Gas Co.,* 523 F. 2d 1190 (5th Cir 1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant. 832 F. 2d at 1547.

Following the Eleventh Circuit's decision in *Self,* that case came back to the district court to resolve the claim of Great Lakes Dredge & Dock Company for contribution from Chevron Shipping Company. Chevron had many years previously settled with the plaintiffs and obtained a release. Great Lakes nevertheless claimed contribution from Chevron because Great Lakes paid a greater share to the injured parties than its proportionate share of fault. Chevron moved for summary judgment on Great Lakes contribution claim and argued that *Self* held that no actions for contribution could be brought against a settling tortfeasor. The Court agreed and granted Chevron's motion for summary judgment. *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller,* 1990 A.M.C. 2247 (M.D. Fla. 1990).

In this case Boca Grande Club has settled with the Stipulating Claimants. A copy of the release given to Boca Grande Club is attached as Exhibit A. That settlement bars the claims of FPL and O'Day for contribution. Accordingly, the Court must forthwith enter summary judgment in favor of Boca Grande Club as to the contribution claims of FPL and O'Day.

C. Good Faith Settlement.

FPL objected to the Joint Motion and Stipulation filed by Boca Grande Club and the Stipulating Claimants which sought an order of dismissal of the claims of the Stipulating Claimants and the stay of further proceedings in the limitation action. The basis for FPL's objection to the settlement was stated by FPL as follows:

> . . . Florida Power & Light Company cannot agree to dismissal of any claims upon any terms which effect the claims filed by Florida Power & Light Company. Specifically, any Court Order which purports to pass upon the settlement should not operate to foreclose Florida Power & Light Company from later challenging the settlement, particularly if the alleged 'good faith' nature of the settlement is used as a premise for Boca Grande Club, Inc.'s subsequent motion for summary judgment on Florida Power & Light Company's claims for contribution and/or indemnity. (Florida Power & Light Company's Memorandum In Response To Stipulation And Joint Motion For Dismissal, p. 3).

FPL cited no authority for the proposition that a settlement must be demonstrated to be in good faith before it effectively bars claims for contribution. At the hearing before the magistrate FPL articulated the same point quoted above, again, without referring the magistrate to any authority to support the proposition. Given the position that FPL has taken it is assumed that FPL will oppose this motion for summary judgment as to the contribution claims upon the grounds that this Court has not determined that the settlement between Boca Grande

Club and the Stipulating Claimants was made in "good faith."

The term "good faith" is susceptible of many meanings. FPL has yet to divulge precisely what it conceives is encompassed by its use of the phrase. The settlement between Boca Grande Club and the Stipulating Claimants was made in "good faith" from the perspective of both Boca Grande Club and the Stipulating Claimants. The settlement was made in the open, without any collusive purpose or ulterior motive. From the perspective of Boca Grande Club, the club settled a case in which it did not deem itself to be responsible and in which it believed ultimately it would be found to be free of fault, in order to extricate itself from a time consuming and expensive lawsuit. From the perspective of the Stipulating Claimants, they received a sizeable amount of money from a party that they had not sued in their state court actions, in order to remove themselves from a limitation proceeding that potentially restricted and seriously complicated the prosecution of their actions against the parties they considered to be primarily liable; i.e., the defendants in the state court actions. (Boca Grande Club was not initially sued in the state court actions by the Stipulating Claimants. Boca Grande Club was brought into those actions by the third party complaint of FPL asking for indemnity and contribution.)

In so far as concerns the effect of the settlement upon the remaining claims of FPL and O'Day for contribution, it is the position of Boca Grande Club that the settlement bars contribution. It is the position of Boca Grande Club that it is not necessary for Boca Grande Club to endeavor to unilaterally demonstrate that the settlement was in

"good faith" in any sense, nor is it necessary that the district court hold a hearing or trial to determine whether or not the settlement was made in "good faith." The fact that there has been a settlement and release given to Boca Grande Club is sufficient to bar the contribution claims of FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540 (11th Cir 1987).

Courts outside of the Eleventh Circuit have dealt with the concept of good faith in deciding what effect a settlement will have on contribution claims in maritime cases. The opinions in *Miller v. Christopher,* 887 F. 2d 902 (9th Cir 1989) and *Commercial Cleaning Corporation v. Allied Chemical Company,* 206 Cal App 3d 1066, 254 Cal Rptr 401, 1989 A.M.C. 769 (1988, 4th Dist.) provide useful background to the different theories as to the effect a settlement has on claims for contribution by non-settling parties. (Because the opinion in *Commercial Cleaning Corporation v. Allied Chemical Company* was withdrawn by the California Supreme Court that opinion cannot be considered as precedent. See *Great Lakes Dredge & Dock Company v. Tanker Robert Miller,* 1990 A.M.C. 2254, 2249, n 1 (M.D. Fla. 1990). Nevertheless, the opinion is most useful and is entitled, at least, to the consideration given to a relevant text or law review article.)

Both opinions discuss at length the three potential solutions to the problem presented in a situation where one of a number of defendants enters into a settlement with the plaintiff. The alternatives are set out in Restatement (Second) of Torts §886 A, comment m. The second alternative is that:

> (2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution.

The courts in *Commercial Cleaning* and *Miller v. Christopher* both recognized that the Eleventh Circuit, in *Self v. Great Lakes Dredge & Dock Company, supra,* elected to follow the quoted alternative; namely, that settlement extinguishes rights to contribution by the remaining defendants. *Miller v. Christopher,* 887 F. 2d 902, 905-906 (9th Cir 1989); *Commercial Cleaning Corporation v. Allied Chemical Company,* 1989 A.M.C. 769, 778-789 (4th Dist 1988). The Restatement comment notes that the second alternative favors the settling tortfeasor and suggests that a requirement of good faith may be necessary, but then concludes:

> But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, *the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated.* See 1989 A.M.C. at 775 (Emphasis added).

In other words, a requirement that there be a demonstration that a settlement comports with some pre-established criteria of "good faith" will effectively dilute the finality of settlement. If there can be no certainty and finality as a result of a settlement there can be no incentive to settle in the first place.

It is very clear that the Eleventh Circuit, in selecting the second alternative, was very conscious of the fact that a non-settling tortfeasor could end up paying more or

less than its judicially determined proportionate share of a loss. On this point the court held:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case *and that in the absence of a settlement,* the amount of contribution turns on the percentage of fault of each joint tortfeasor.
>
> * * *
>
> We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and non-settling tortfeasor in maritime personal injury actions. 832 F. 2d at 1547-1548 (Emphasis added).

Significantly, the Court in *Self* did not tack on to the rule that contributions cannot be obtained from settling tortfeasors a requirement that there must be a demonstration that the settlement was in "good faith." Implicit in the Eleventh Circuit's decision in *Self* is the rejection by that court of the concept that a settlement, to act as a bar against claims for contributions by non-settling tortfeasors, must reasonably represent the ultimate degree of proportionate fault of the settling tortfeasor. *Cf. Leger v. Drilling Well Control, Inc.*, 592 F. 2d 1246 (5th Cir 1979). *Leger* was rejected by the Eleventh Circuit. *Self*, 832 F. 2d at 1547-1548.

By contrast, the United States Court of Appeals for the Ninth Circuit in *Miller v. Christopher*, 887 F. 2d 902 (9th Cir 1989) affirmed a determination of the district court

that the settlement reached in that case was made in good faith and therefore barred claims for contribution from the settling tortfeasors. The Ninth Circuit approved the district court's use of California law to apply the standard for determining whether the settlement was in good faith, notwithstanding the fact that the court pointed out that in maritime cases state law is not controlling. 887 F. 2d at 905.

The difference between the rule developed in *Self* and the approach taken by the Ninth Circuit in *Christopher* is obvious. Under the *Self* rule a settlement, without more, bars contribution claims against the settling tortfeasor. Under the *Christopher* approach it is necessary for the district court to conduct an evidentiary hearing in an effort to approximate the value of the plaintiff's claim and to evaluate the relative degrees of fault among the defendants. After this expenditure of labor there may follow an appeal with a full review by the appellate court of the actions of the district judge. Clearly this is an impractical approach. Boca Grande Club submits that the *Christopher* approach is wasteful and unworkable. Obviously, no rational party would pay several hundred thousand dollars to settle his dispute with a plaintiff if the result was that he had to participate in a trial to ascertain whether the settlement met a "good faith" criteria followed by an appeal taken by a disgruntled non-settling tortfeasor trying to protect its right of contribution.

In *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller*, 1990 A.M.C. 2247 (M.D. Fla. 1990), Great Lakes sought to avoid the effect of the settlement bar rule of *Self* by arguing that the court should determine relative

degrees of fault between the various tortfeasors. The district court refused and noted:

> The matters in need of resolution in order to determine contribution are so voluminous that to resolve them, if they are resolvable at all, would involve the staging of the trials that the parties sought to avoid through settlement. Great Lakes labeled 'unworthy of consideration' Chevron's argument concerning this burden. The Court views the matter otherwise. Setting aside the destructive impact on future settlements that the precedent of such a trial would have,. . . . the Court is persuaded that Great Lakes' proposal would invest an enormous amount of judicial resources in an essentially futile enterprise. In addition to the criticism leveled previously herein, the Court observes that the persons with the greatest knowledge of the relevant issues are the claimants who have settled their claims, and those persons no longer are parties to these actions. Their absence from the proposed proceedings would reduce the reliability and accuracy of the determinations reached; their presence would be an unjustified burden. 1990 A.M.C. at 2253, n 4.

If a settlement between a plaintiff and one of several tortfeasors in a maritime personal injury case is subject to judicial inquiry to determine whether or not it is in "good faith" or reasonable in light of the ultimate value of the plaintiff's claims and the potential liability of the various defendants, which determination will obviously be subject to appeal, then there will be few if any settlements concluded. A settlement subject to "good faith" will not permit the settling party to close his file and know that his involvement in the controversy is at an end. That is

true even if the district courts had the manpower and time to judicially oversee settlements and the appellate courts resources ample to review all such determinations of the trial courts. The rule developed by the Eleventh Circuit in *Self* is simple, reasonable and practical. It permits a settling tortfeasor to close his file knowing that all claims for contribution against him are barred; he is no longer involved in the controversy and need have no concerns about its ultimate outcome. That rule must be applied to the settlement between Boca Grande Club and the Stipulating Claimants and summary judgment must be awarded in favor of Boca Grande Club as to the claims for indemnity and contribution of FPL and O'Day.

D. <u>The Settlement has Been Approved.</u>

The settlement between Boca Grande Club and the Stipulating Claimants has been approved by the principal claimants and the Circuit Court for Palm Beach County. Attached as Exhibit B is a copy Motion for Approval of Settlement filed (in the Circuit Court for Palm Beach County) by Stephanie J. Polackwich and Alan S. Polackwich, Sr., two of the Stipulating Claimants. These claimants point out to the court that the settlement is in the best interest of "all claimants and survivors." Attached to the motion are the affidavits of individual Stipulating Claimants in which they inform the Circuit Court that they confirm their agreement to the settlement and the manner in which they have agreed to distribute the settlement proceeds. Each asks the Circuit Court to approve the settlement.

Boca Grande Club has been informed that the Circuit Court has held a hearing on the motion asking for approval of the settlement and thereafter entered an Order approving of the settlement. A copy of that order has been requested and will be filed upon receipt by Boca Grande Club.

Boca Grande Club submits that approval of the settlement by the Circuit Court establishes that the settlement was in "good faith" even though such approval is not necessary under the rule of *Self v. Great Lakes Dredge & Dock Co.*, 832 F. 2d 1540 (11th Cir 1987).

Conclusion

In view of the foregoing the Court should forthwith enter an order determining that neither Florida Power & Light Company nor The O'Day Corporation have claims for indemnity against Boca Grande Club, Inc. The order should further provide that the settlement between Boca Grande Club, Inc. and the individual Stipulating Claimants bars any claims for contribution that Florida Power & Light Company and The O'Day Corporation may otherwise have had. Upon the authority of *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540 (11th Cir 1987) and the other authorities cited above, summary judgment should be entered in favor of Boca Grande Club, Inc. and against Florida Power & Light Company and The O'Day

Corporation upon the claims for indemnity and contribution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail this 29th day of April, 1991 to Christian D. Searcy, Esquire, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., Post Office Box Drawer 3626, West Palm Beach, Florida 33402, Tony Cunningham, Esquire, Wagner, Cunningham, Vaughan and McLaughlin, 708 E. Jackson Street, Tampa, Florida 33602, Nathaniel G. W. Pieper, Esquire and James F. Pingel, Jr., Esquire, Post Office Box 838, Tampa, Florida 33601 and C. Steven Yerrid, Esquire and Christopher S. Knopik, Esquire, Yerrid, Knopik & Valenzuela, P.A., 101 E. Kennedy Boulevard, Barnett Plaza, Suite 2160, Tampa, Florida 33602.

/s/ Jack C. Rinard
JACK C. RINARD